IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.731 OF 2005

AONG WITH

CHAMBER SUMMONS NO.399 OF 2004

IN

EXECUTION APPLICATION NO.192 OF 2002

IN

SUMMARY SUIT NO.491 OF 1999

Jetu Jacques Taru Lalvani,
of Bombay, Indian Inhabitant,
carrying on business at Kamanwala
Chambers, 4th Floor, Sir P.M.Road,
Fort, Mumbai - 400 001. ...Plaintiff

Versus

1. Solestrap Industries Pvt.Ltd.,
   a company duly registered under the
   Companies Act, 1956, inter alia
   carrying on business at 1st Floor,
   Bharat Insurance Building, 15-A,
   Horniman Circle, Bombay-400 023.

2. Hamco Mining & Smelting Ltd.,
   a company duly registered under
   Companies Act, 1956 and having its
   Office at Yashwant Chambers,
   2nd Floor, 18, Burjorji Bharucha Marg,
   Fort, Bombay - 400 023.

3. Mr.B.M.Patel, of Bombay Indian
   Inhabitant, residing at 12-C,
   Atlas Apartment, Harkness Road,
   Bombay - 400 026. ...Defendants

And

Smt.Nita M.Patel,
mother and natural guardian of
minor Mst.Naman M.Patel residing at
'Vimal House', (Near Stadium Petrol Pump),
Navrangpura, Ahmedabad - 380 014, and
presently residing at Atlas Apartment,
11, Jamnadas Mehta Road, (formerly
known as Harkness Road), Malabar Hill,
Mumbai 400 006. ...Applicant

.....

Ms.Anjali Chandurkar with Mr.A.H.Gokhale i/b
Mr.A.S.Dayal & Associates for Applicant in
Chamber Summons No.731 of 2005.

Mr.M.K.Mudnaney for Plaintiff (Applicant in
Chamber Summons No.399 of 2004).

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CORAM: A.M.KHANWILKAR, J.

JULY 20, 2005.

JUDGMENT :

1. Heard Counsel for the parties.

2. This order will dispose of both the Chamber Summonses.

3. Briefly stated, the Judgment Creditor filed Summary Suit against the Defendants, which

has been decreed on 18th March 2002. The said decree has become final and has not been challenged by any of the Defendants. In execution of the said decree, the Judgment Creditor persuaded the Executing Court to issue Warrant of Attachment in respect of Flat No.12-C, Atlas Apartment, First Floor, Harkness Road, Malabar Hill, Mumbai-400 006 on the assertion that the said flat belongs to Defendant No.3. Warrant of Attachment was issued on 15th May 2002. Consequent thereto, warrant of sale in respect of the said premises was issued on 25th February 2003. When the proceedings were in progress before the Commissioner, the third party/Applicant filed objection on 19th May 2003 to proceed with the warrant of sale on the assertion that the premises in question belong to Master Naman Madhav Patel. The third party/Applicant has filed that objection as guardian of minor Naman Madhav Patel. It is stated that the said property is part of property of Atlas Apartments Co-operative Housing Society Limited, which is a co-partnership Society. The flat was originally allotted to the grandfather of Naman Madhav Patel, as member of the said Society. The grandfather of

Naman Madhav Patel, who is Defendant No.3 was member of the Society. He in turn, has executed a declaration of gift on 29th October 1993 whereunder he has declared his intention to gift five shares held by him as Member of the Society in favour of Naman Madhav Patel absolutely and all the rights incidental thereto. It is not in dispute that the declaration of gift is not a registered document. Even so, on the basis of the said declaration, the Society has transferred the share certificates in favour of Naman Madhav Patel on 9th April 1995. On the above basis, it is stated by the third party that the premises in question belong to Naman Madhav Patel and the same cannot be attached or put to sale in execution of decree against the Defendant No.3, although the Defendant No.3 happens to be the grandfather of Naman Madhav Patel. After this objection was taken before the Commissioner, the Judgment Creditor filed Chamber Summons No.399 of 2004 before this Court for the following reliefs:

> "(a) that it be held that the attachment of the right, title and interest of the Respondent has become final and the Commissioner cannot go into the question

of the title of the Respondent and at the highest, the Commissioner can mention the claim of the Respondent in the proclamation for sale.

(b) that the Respondent be directed to give inspection of the documents mentioned in Schedule ‘A’ annexed hereto or of such of the documents as this Hon’ble Court may deem fit and proper;

(c) that the Respondent be directed to answer the interrogatories mentioned in the Plaintiff’s advocate’s letter dated 5.7.2003, and mentioned in the Schedule ‘B’ annexed hereto;

(d) that the Plaintiff be given liberty to bid at the auction sale of the premises viz. flat No.12-C, Atlas Apartment, Harkens Road, Mumbai 400 026;

(e) that the cost of Chamber Summons be provided for,

(f) such other and further reliefs be granted to the Plaintiff as the nature and circumstances of the case may require."

4. Later on, the third party has filed Chamber Summons being Chamber Summons No.731 of 2005 for the following reliefs :

"(a) that the delay, if any, in taking out the present Chamber Summons be condoned;

(b) that the Applicants’ objection to the Warrant of Attachment and Warrant of Sale dated 15.5.2002, and 24.2.2003 respectively, to the said Flat No.12-C, Atlas Apartment, 1str Floor, Atlas

apartment, Harkness Road, Malabar Hill, Mumbai - 400 006 be allowed;

(c) that the said Flat No.12-C, Atlas Apartment, 1st Floor, Atlas apartment, Harkness Road, Malabar Hill, Mumbai - 400 006, be released from Attachment and consequently the Warrant of Attachment and Warrant of Sale dated 15.5.2002, and 24.2.2002 respectively be set aside;

(d) and for such further and other reliefs as the nature and circumstances of the case require;

(e) for costs of the Chamber Summons be provided for."

5. After considering the rival submissions, the first question that arises for my consideration is whether the Chamber Summons taken out by the third party/Applicant ought to be rejected on the ground that the relief claimed therein is designedly or unnecessarily delayed. According to the Judgment Creditor, no justification is offered by the third party as to what prevented the third party to move the Chamber Summons at the earliest opportunity, in any case, soon after the Judgment Creditor had taken out Chamber Summons No.399 of 2004 on 5th March 2004. Whereas, the present Chamber Summons (No.731/2005) has been taken out on 12th April 2005.

6. The argument of Judgment Creditor seems to be attractive at the first blush, but I find substance in the argument canvassed on behalf of the third party that the time spent for taking out the present Chamber Summons at the instance of third party, cannot be described as designedly or unnecessarily delayed, which is the requirement of clause (b) of sub-rule (1) of Rule 58 of Order XXI of the Code of Civil Procedure.

7. It cannot be disputed that the questions which are raised in the proceedings taken out by both the parties will have to be considered only by this Court, which is the requirement of Sub-rule (2) of Rule 58 of Order XXI of the Code of Civil Procedure. Thus understood, the third party was not going to be benefited in any manner on account of delay in taking out the present Chamber Summons, and more particularly, when all those questions which are required to be considered in the Chamber Summons taken out by the third party could be and are required to be considered in the Chamber Summons taken out by the Judgment Creditor.

Accordingly, I find no substance in the objection taken on behalf of the Judgment Creditor that the Chamber Summons of the third party be rejected on the ground that it is designedly or unnecessarily delayed.

8. The next question that arises, however, is of some interest. According to the third party/Applicant, the share certificates have been transferred in favour of Naman Madhav Patel on account of which he has acquired all the rights incidental to the said share certificates in respect of the disputed property. If it is so, the property cannot be attached or put to sale in execution of decree pending against the Defendant No.3, who happens to be his grandfather. The Judgment Creditor, however, contends that the claim of transfer of share certificate in favour of Naman Madhav Patel to be valid in law, is misconceived. According to the Judgment Creditor, it is not in dispute that the shares have been transferred on the basis of the document/instrument executed by Defendant No.3 on 5th August 1993 which is described as declaration of gift. It is contended

that if the document on the basis of which shares are transferred in favour of Naman Madhav Patel, as a consequence of which, he becomes entitled to occupy and enjoy the premises in question, such document was required to be registered by virtue of Section 123 of the Transfer of Property Act read with Section 17(1)(a) of the Registration Act, 1908. Section 123 of the Transfer of Property Act reads thus :

> **"123. Transfer how effected.-** For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.
>
> For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.
>
> Such delivery may be made in the same way as goods sold may be delivered."

9. As mentioned earlier, the document dated 5th August 1993 executed by Defendant No.3 is declaration of gift. If it is an instrument of gift of immovable property, the same is required to be registered by virtue of Section 17(1)(a) of the

Registration Act. The fact that the document is a gift of immovable property can be straightway answered on the basis of definition of immovable property in Section 2(6) of the Registration Act, 1908, which reads thus:

> **"2. Definitions.-** In this Act, unless there is anything repugnant in the subject or context,-
>
> (6) "immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass."

10. The document in question clearly refers to the fact that the Defendant No.3 has gifted his five shares absolutely to Naman Madhav Patel and all the rights incidental thereto. The rights incidental to the shares are nothing but the interest in the immovable property allotted to the member as against those shares. **(See AIR 1990 Bom. 204 Hanuman Vitamins Foods Pvt.Ltd. & Ors. vs. State of Maharashtra & Anr. (Para 8).** If it is transfer of interest in the immovable property,

such transfer will be covered by the purport of Section 17(1)(a) of the Registration Act, 1908 read with Section 123 of the Transfer of Property Act, 1882 being the gift of immovable property.

11. To get over this position, Counsel for the third party has relied on the decision of our High Court in the case of **Usha Arvind Dongre vs.Suresh Raghunath Kotwal reported in 1990 (3) Bom.C.R. 389** to contend that shares of a tenant co-partnership housing society are not by themselves immovable property and consequently, registration is not required. In that case, the Award was passed between the parties whereunder, it was declared that party of the second part would exchange her share in the furnished flat and other movables and the mode of payment in instalments as prescribed. The question which was agitated before this Court is set out in Para 5 of the reported Judgment. It was argued that the Award was bad in law and cannot be looked at by the Court because the Award required registration under Section 17(1)(b) of the Registration Act; and as the Award was unregistered, it could not confer any right on the

parties, for which reason, decree in terms of the Award cannot be proceeded. The argument which was canvassed before this Court was considered in the context of Section 41 of the Maharashtra Co-operative Societies Act, 1960 which provides for exemption from compulsory registration of instrument referring to shares and debentures of the Society. The said provision expressly provides that nothing in clauses (b) and (c) of sub-section (1) of Section 17 of Registration Act shall apply to the documents specified in the said Section. After adverting to the said provision and the decision of the Apex Court in **Ramesh Himmatlal Shah v.Harsukh Jadhavji Joshi reported in A.I.R. 1975 SC 1470,** the Court went on to observe in Para 11 as follows:

> 11. ..... In my view section 17 of the Registration Act which requires compulsory registration of certain documents, failing which documents cannot be looked at, requires to be strictly construed. Looking to section 41 of the Maharashtra Co-operative Societies Act, 1960 the Intention was clearly to exclude transfer of shares in a Co-operative Society from the provisions of section 17 of the Registration Act. In the case of a tenant co-partnership housing society the title of the flat remains in the society

> and is not affected by the transfer of shares in the society. Only the right to occupy a flat flows from the ownership of share in such a co-operative society. The shares, thereby do not become immoveable property. A transfer of such shares, thereby do not become immoveable property. A transfer of such shares does not require registration under section 17(1)(b). Even if the transfer of such shares is considered as a transfer of interest in an immoveable property, section 41 of the Maharashtra Co-operative Societies Act exempts the document affecting transfer of such shares from the ambit of section 17(1)(b) of the Registration Act".

. Relying on the aforesaid exposition, it was argued on behalf of the third party that by no stretch of imagination, registration either of the declaration of gift or for that matter, the shares which have been transferred in favour of Naman Madhav Patel required registration. This argument, however, clearly overlooks that we are not concerned with instruments referred to in clauses (b) and (c) of Sub-section (1) of Section 17 of the Registration Act. The above said reported decision is an authority in relation to the instruments and documents which are covered by clauses (b) and (c) of sub-section (1) of Section 17 of the Registration Act. In the present case, however, the document (declaration of gift) by virtue of

which shares are transferred, as has been found earlier, is covered by Section 17(1)(a) of the Registration Act. Such document is not exempted from registration as clause (a) of sub-section (1) of Section 17 is not included in Section 41 of the Maharashtra Co-operative Societies Act.

12. Counsel for the third party would contend that what has been transferred in favour of Naman Madhav Patel, is only the share certificate and if it is so, the same is excluded from registration. It is further argued that document by virtue of which the shares have been transferred in favour of Naman Madhav Patel be considered as one governed by Clause (b) of sub-section (1) of section 17 of the Act. It is not possible to accept this submission. It is rightly argued on behalf of the Judgment Creditor that Section 17 carves out different instruments in Clauses (a) to (e) thereof. If such construction was to be accepted, that would result in ignoring the distinction recognised by the Legislature of an instrument of gift of immovable property as such, which is covered by clause (a) of sub-section (1) of Section 17 of the Registration

Act.

13. Counsel for the Judgment Creditor has rightly placed reliance on the decision of the Apex Court in the case of **Smt.Gomtibai (dead) through LRs. and others vs. Mattulal (dead) through LRs. reported in A.I.R. 1997 SC 127** to contend that even if the gift is acted upon by donee in absence of registered instrument of gift and acceptance thereof by donee, property in question cannot be said to be validly transferred to the said donee. In other words, as there is no valid transfer in favour of Naman Madhav Patel which was intended in terms of declaration of gift dated 5th August 1993, steps taken on the basis of such inadmissible document, will be of no avail. Even if the Society has registered the five shares in the name of Naman Madhav Patel, in law, there is no valid transfer of interest in the premises in question, which was originally held and enjoyed by Defendant No.3, in absence of registration of the purported gift deed. On this finding, it will necessarily follow that *de jure* the Defendant No.3 continues to have interest in the said property and the transfer of shares in

favour of the said Naman Madhav Patel will have to be ignored as non-est.

14. Viewed in this perspective, the Judgment Creditor ought to succeed in terms of prayer clause (a) to (d) of the Chamber Summons.

15. Counsel for the third party would then contend that the present proceedings taken out by third party is in the nature of Suit and should be conducted as a full-fledged trial on the issues that may arise for the consideration. However, for the view that I have taken, it is purely a question of law. It is unnecessary to require the parties

to adduce evidence. This is so, because the fact that declaration of gift dated 5th August 1993 is not a registered document is not in dispute. The question therefore is whether there was valid transfer in favour of Naman Madhav Patel. As I have held earlier, there was no valid transfer in favour of Naman Madhav Patel, it is not necessary to go into other questions, which may require evidence to be led by the parties. Similarly, it is not necessary for me to dwell upon the argument canvassed on behalf of the Judgment Creditor that the impugned transfer by Defendant No.3 in favour of Naman Madhav Patel by virtue of the purported declaration of gift is fraudulent within the meaning of Section 53 of the Transfer of Property Act or that the same be disbelieved as the original document of gift deed is not produced.

16. Counsel for the third party then contends that the shares are already transferred in favour of Naman Madhav Patel as back as on 9th April 1995 and that act of the Society has not been challenged by anyone so far. Besides, Naman Madhav Patel is

in occupation of the disputed premises since prior to the gift deed executed in his favour. As has been found earlier, if the basis on which the claim of the third party is founded, cannot be sustained, subsequent steps taken including the act of registration of shares in the name of Naman Madhav Patel by the Society will make no difference in law. This objection of the third party can be answered on the basis of principles stated by the Apex Court in **Gomtibai's case (supra)**.

17. Accordingly, Chamber Summons taken out by the third party will have to be rejected and instead, the Chamber Summons taken out by the Judgment Creditor is made absolute in terms of prayer clauses (a) to (d) referred to in Para 3 above.

18. No order as to costs. Ordered accordingly.

19. At this stage, Counsel for the third party prays that the operation of this Judgment be stayed

for a period of four weeks from today, as the third party may consider taking up the matter in appeal.

Accordingly, this order not to be given effect for a period of four weeks from today.

A.M.KHANWILKAR, J.